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ATTORNEY GENERAL OF MALAYSIA v. DATO' SEE TEOW CHUAN & ORS

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
ABU SAMAH NORDIN FCJ
B RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 02(f)-11-2011(W)]
26 SEPTEMBER 2017

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CIVIL PROCEDURE: *Contempt – Proceedings – Absence – Contemnors absent during hearing of matter due to poor health, illness and incapacity – Contemnors offered apology and prepared to be sentenced in absentia – Whether contemnors' attendance in court could be dispensed with – Whether matter against contemnors* D *could be dealt with in absentia – Whether contemnors could be discharged with warning – Whether court seized with power to proceed with trial of contempt proceedings and to impose sentence against contemnors who waived right to be present in court*

E The High Court had ordered that Kian Joo Holdings Sdn Bhd be wound up pursuant to s. 218(f) and (i) of the Companies Act 1965. The liquidators entered into a conditional shares sale agreement for the sale of shares to Can-One International Sdn Bhd. In opposing the transaction, the majority contributories filed an application to the High Court against the liquidators for leave to proceed with legal proceedings for alleged misconduct in the F tender of the company's assets. The High Court dismissed their application but upon appeal to the Court of Appeal, the decision was overturned. The liquidators then appealed to the Federal Court against the decision of the Court of Appeal and the appeal was allowed. The contributories filed an application to the Federal Court to review its judgment, claiming that the G Federal Court's grounds of judgment revealed that there was plagiarism and a substantial reproduction of the liquidators' written submission. The Federal Court dismissed the application. The liquidators initiated contempt proceedings against all the majority and minority contributories and their two lawyers, VK Lingam ('VKL') and Thisinayagam Somasundram ('TS') alleging, *inter alia*, that the affidavits in support of the said review application H affirmed by them on advice of the lawyers contained statements, which were in contempt of the Federal Court, which would scandalise the Federal Court and subvert the administration of justice. When the liquidators withdrew from the contempt proceedings, the Attorney General's Chambers was substituted as the applicant. The contributories who were present and TS

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conceded to the contempt charges and were sentenced to a fine of RM100,000 each and RM150,000, respectively. As three minority contributories and VKL were not present in court, the action against them was postponed. When the matter came up again, the three minority contributories and VKL were not present in court. The counsel, who appeared on behalf of the minority contributories, informed the court that (i) See Siew Hua had passed away; (ii) Lim Ah Heng was unable to attend court due to poor health, illness and incapacity; and (iii) Doris See, a pensioner residing in England for years, was incapacitated by old age and unable to travel. The counsel, on behalf of both Lim Ah Eng and Doris ('the contemnors'), applied that (i) their attendance in court be dispensed with and the matter against them be dealt with *in absentia*; and (ii) both of them be discharged with a warning as they were not asserting their right but had waived their right to be present in court and were prepared to be sentenced *in absentia*. The issue that arose for the court's adjudication was whether the court had the power to proceed with the trial of the contempt proceedings and to impose sentence against the contemnors who had offered their apology and had waived their right to be present in court and were prepared to be sentenced *in absentia*.

Held (imposing sentence accordingly)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) Contempt proceedings are *quasi*-criminal in nature. Thus, generally the court should avoid making a committal order without giving the contemnor a chance to be present in court to answer the charge against her and to raise any plea of mitigation before passing sentence on her. (para 21)

(2) The court had the power to proceed with the trial to determine their guilt of contempt as charged and consequently to proceed sentencing them. The contemnors had, in their affidavits and through their counsel, voluntarily requested for such course of action. They knew the nature and consequence of their request. Such course of action did not cause any prejudice to both of them. Based on the mitigating factors and circumstances of the case, this was an appropriate case for the court to accede to their request and to impose the appropriate sentence against them. (para 27)

(3) There were 20 other contemnors in this contempt proceedings, comprising the majority and minority contributories, who had earlier conceded to the contempt charges against them, admitted their guilt and expressed their unreserved apology and remorse to the court without putting up a defence. Many of them were also of advanced age and unwell. With that concession, which was accepted by the court, they

were sentenced to a fine of RM100,000, in default eight months' imprisonment. The same view and consideration were adopted in dealing with the two contemnors. The appropriate sentence against both of them was a fine of RM100,000, in default eight months' imprisonment. (paras 30 & 32)

Bahasa Malaysia *Headnotes*

Mahkamah Tinggi telah memerintahkan Kian Joo Holdings Sdn Bhd digulung bawah s. 218(f) dan (i) Akta Syarikat 1965. Pelikuidasi-pelikuidasi memeterai perjanjian jualan saham bersyarat bagi jualan saham kepada Can-One International Sdn Bhd. Membantah transaksi ini, pencarum majoriti memfailkan permohonan di Mahkamah Tinggi terhadap pelikuidasi-pelikuidasi untuk kebenaran meneruskan dengan prosiding guaman bagi salah laku yang didakwa dalam tender aset-aset syarikat. Mahkamah Tinggi menolak permohonan mereka tetapi melalui rayuan di Mahkamah Rayuan, keputusan ini diakas. Pelikuidasi-pelikuidasi seterusnya merayu di Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan dan rayuan ini dibenarkan. Pencarum-pencarum memfailkan permohonan di Mahkamah Persekutuan untuk menyemak penghakimannya, atas dakwaan alasan penghakiman Mahkamah Persekutuan menunjukkan plagiarisme dan sebahagian besarnya, salinan semula hujahan bertulis pelikuidasi-pelikuidasi. Mahkamah Persekutuan menolak permohonan tersebut. Pelikuidasi-pelikuidasi memulakan prosiding penghinaan terhadap kesemua pencarum majoriti dan minoriti dan dua peguam mereka, VK Lingam ('VKL') dan Thisinayagam Somasundram ('TS') atas dakwaan, antara lain, afidavit sokongan permohonan semakan yang diikrarkan oleh mereka atas nasihat peguam mengandungi pernyataan, yang menghina Mahkamah Persekutuan, yang akan menyebabkan skandal di Mahkamah Persekutuan dan menjatuhkan pentadbiran keadilan. Apabila pelikuidasi-pelikuidasi menarik diri daripada prosiding penghinaan tersebut, Jabatan Peguam Negara digantikan sebagai pemohon. Pencarum-pencarum yang hadir dan TS mengakui pertuduhan-pertuduhan penghinaan dan dikenakan denda, masing-masing, RM100,000 seorang dan RM150,000. Oleh kerana tiga pencarum minoriti dan VKL tidak hadir ke mahkamah, tindakan terhadap mereka ditangguhkan. Apabila hal perkara ini timbul semula, tiga pencarum minoriti dan VKL tidak hadir ke mahkamah. Peguam yang mewakili pencarum-pencarum minoriti ini memaklumkan mahkamah (i) See Siew Hua telah meninggal dunia; (ii) Lim Ah Heng tidak dapat hadir ke mahkamah kerana tidak sihat, berpenyakit dan tidak berkeupayaan; dan (iii) Doris See, seorang pesara yang bermastautin di England bertahun lamanya, tidak berkeupayaan dan tidak boleh melalui perjalanan jauh akibat usia tua. Peguam tersebut, mewakili Lim Ah Heng dan Doris ('penghina-penghina'), memohon agar (i) kehadiran mereka ke mahkamah tidak diperlukan dan hal perkara

terhadap mereka diselesaikan tanpa kehadiran mereka; dan (ii) kedua-dua mereka dilepaskan dengan amaran kerana mereka tidak menegaskan hak mereka sebaliknya mengetepikan hak mereka untuk hadir ke mahkamah dan bersedia dijatuhkan hukuman tanpa kehadiran mereka. Isu yang timbul bagi pertimbangan mahkamah adalah sama ada mahkamah mempunyai kuasa meneruskan perbicaraan prosiding penghinaan dan mengenakan hukuman terhadap penghina-penghina yang telah mengemukakan permohonan maaf dan mengetepikan hak mereka untuk hadir ke mahkamah dan bersedia dijatuhkan hukuman tanpa kehadiran mereka.

Diputuskan (menjatuhkan hukuman sewajarnya)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Prosiding penghinaan bersifat separa jenayah. Oleh itu, amnya, mahkamah seharusnya mengelak mengeluarkan perintah pengkomitan tanpa memberi peluang kepada penghina hadir ke mahkamah untuk menjawab pertuduhan terhadapnya dan mengemukakan rayuan mitigasi sebelum menjatuhkan hukuman atasnya.

(2) Mahkamah mempunyai kuasa meneruskan dengan perbicaraan untuk memutuskan kebersalahan mereka kerana menghina seperti yang dipertuduh dan seterusnya menjatuhkan hukuman atas mereka. Penghina-penghina telah, dalam afidavit dan melalui peguam mereka, secara sukarela memohon cara ini. Mereka sedar akan sifat dan akibat permohonan mereka. Cara sedemikian tidak menyebabkan apa-apa prejudis terhadap mereka. Berdasarkan faktor-faktor mitigasi dan hal-hal keadaan kes, kes ini sesuai bagi mahkamah memenuhi permohonan mereka dan mengenakan hukuman yang sesuai atas mereka.

(3) Terdapat 20 penghina lain dalam prosiding penghinaan ini, iaitu pencarum majoriti dan minoriti, yang terlebih dahulu mengakui pertuduhan penghinaan terhadap mereka, mengaku bersalah dan menzahirkan permohonan maaf dan sesalan sepenuhnya tanpa mengemukakan pembelaan. Kebanyakan mereka sudah berusia lanjut dan tidak sihat. Dengan pengakuan ini, yang diterima mahkamah, mereka dikenakan denda RM100,000, jika gagal penjara lapan bulan. Pandangan dan pertimbangan yang sama diguna pakai dalam hal dua penghina ini. Hukuman yang sesuai terhadap mereka adalah denda RM100,000 jika gagal penjara lapan bulan.

Case(s) referred to:
Chung Onn v. Chan Ah Kaw & Anor [1996] 1 LNS 456 HC ***(refd)***
Indira Gandhi Mutho v. Patmanathan Krishnan And (Anyone Having Custody And Control Over Prasana Diksa) [2015] 6 CLJ 35 HC ***(refd)***
JSC BTA Bank v. Solodchenko & Ors [2011] EWHC 2163 (Ch) ***(refd)***
JSC BTA Bank v. Solodchenko and Others (No. 2) [2011] 1 WLR 906 ***(refd)***

Phonographic Performance Ltd v. Inch [2002] All ER (D) 253 ***(refd)***
R v. Jones [2003] 1 AC 1 ***(refd)***
Re Ellison (A Bankrupt); Hicken (as Trustee in Bankruptcy of Ellison) v. Ellison [2016] EWHC 2791 (Ch) ***(refd)***
Sanchez v. Oboz [2015] EWHC 611 (Fam) ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(f), (i)

For the appellant - Amarjeet Singh & Alice Loke Yee Ching; SFCs, Shaiful Nizam Shahrin; FC
For the Contemnors - David Gurupatham & Tan Shin Lau; M/s David Gurupatham & Koay

[Editor's note: For the Court of Appeal judgment, please see Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Other Appeals [2012] 2 CLJ 535 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ramly Ali FCJ:

[1] On 30 January 1996, by consent, the High Court ordered that Kian Joo Holdings Sdn Bhd (the company) be wound up pursuant to s. 218(1)(f) and (i) of the Companies Act 1965.

[2] At the same time, one Abdul Jabbar bin Abdul Majid and Ng Kim Tuck from KPMG Peat Marwick were appointed as the joint and several liquidators of the company. On 2 October 2007, one Ooi Woon Chee from the same firm was appointed as one of the liquidators to replace Abdul Jabbar bin Abdul Majid.

[3] At the meeting of contributories on 10 July 2008, the majority contributories (representing 52% in value of the company's equity) were in favour of selling of the entire shares of the company, while the remaining contributories (being minority contributories holding 48% in value of the equity) preferred distribution of the shares in specie.

[4] On 23 February 2009, the liquidators entered into a conditional shares sale agreement for the sale of 146,131,500 shares in question to Can-One International Sdn Bhd. The contributories opposed the transaction and had rebuked the liquidators for their acts in breach of fiduciary duties, conflict of interest as well as fraud in regard to the tender process for the sale of the shares.

[5] The majority contributories, represented by their solicitors, Messrs VK Lingam & Co, filed an application to the High Court, against the liquidators for leave to proceed with legal proceedings for alleged

misconduct in the tender of the company's assets and eventual award to Can-One International Sdn Bhd for the sale of the shares. On 25 September 2009, the High Court dismissed their application.

[6] Being dissatisfied with the dismissal of their application by the High Court, the majority contributories appealed to the Court of Appeal against the decision. On 26 April 2010, the appeal was allowed by the Court of Appeal, whereupon the High Court's decision was set aside.

[7] The liquidators then filed a motion for leave to appeal to the Federal Court against the decision of the Court of Appeal. Leave was granted on 21 February 2011. On 5 January 2012, the Federal Court allowed the liquidators' appeal with costs. All orders made by the Court of Appeal were set aside and consequently, all orders made by the High Court were restored. The Federal Court also awarded a sum of RM300,000 (as against the majority contributories) to the liquidators as costs.

[8] Subsequently, all the contributories filed an application to the Federal Court to review its judgment dated 5 January 2012 claiming that the Federal Court's grounds of judgment revealed plagiarism and substantially a reproduction, without any attribution to the liquidators' written submission dated 4 July 2011. The solicitors for the majority contributories, Messrs VK Lingam, filed the review application on the ground of plagiarism. On behalf of the minority contributories, Messrs Nayagam & Partners also filed a similar application using a similar ground.

[9] On 22 May 2013, the review application was dismissed by the Federal Court. The Federal Court was of the view that the adoption of the counsel's submissions as the court's grounds of judgment in itself did not constitute sufficient ground for the court to review and set aside its earlier decision. The Federal Court also held:

(iii) The court accepted that the respondents did not allege actual bias on the part of the panel of judges who decided the appeals concerned but merely one of apparent bias.

(iv) However, having analysed the judgment in question the court did not find sufficient evidence proving apparent bias.

[10] Pursuant to the decision of the Federal Court in the review application, the liquidators initiated contempt proceedings against all the majority and minority contributories (inclusive of their two lawyers, VK Lingam and Thisinayagam a/l A Somasundram) alleging, *inter alia*, that the relevant affidavits in support of the said review application affirmed by them on advice of the lawyers contained statements which were in contempt of the Federal Court which would scandalise the Federal Court and subvert the administration of justice. The contempt proceedings papers were filed at the Federal Court on 29 February 2012 and on 3 April 2012 leave was granted.

[11] On 7 August 2014, the liquidators, who initially initiated the contempt proceedings against all the contributories, sought leave to withdraw from the proceedings. The application to withdraw was allowed. Later, the Attorney General's Chambers applied and was allowed to be substituted as the applicant in the contempt proceedings.

[12] On 21 November 2016, after being postponed for a number of times for various reasons, all the contributories (excluding three of the minority contributories who were not in court on that day) and the lawyer, Thisinayagam a/l A Somasundram, conceded to the contempt charges against them. The lawyer VK Lingam was not present in court on that day.

[13] With the concession made in their affidavits as well as by learned counsel in open court, the Federal Court proceeded to hear their pleas in mitigation. As for sentence, the court then ordered all the contributories who were present in court to pay fine of RM100,000 each (in default eight months' imprisonment). The lawyer, Thisinayagam a/l A Somasundram, was ordered to pay a fine of RM150,000, in default one year imprisonment. As the three minority contributories and the lawyer VK Lingam, were not present in court on that day, the action against them were postponed thus giving them the opportunity to be present and be heard in court. The three other minority contributories were See Siew Hua (Siew Hua), Lim Ah Eng (Ah Eng) and Doris See Siew Lian (Doris).

[14] The matter comes up again in open court on 26 September 2017. Again, all the three minority contributories as well as VK Lingam were not present in court. However, learned counsel Dato' David Gurupatham and Tan Shin Lam appeared on behalf of the minority contributories. They informed the court that, Siew Hua had unfortunately lost her battle with cancer and had passed away on 18 August 2017. A death certificate was tendered in court. Learned counsel then requested that the case against her be discontinued and struck out, which the court allowed.

[15] As for Ah Eng, she was unable to attend court due to poor health, illness and incapacity. She is 88 years old and is suffering from kidney failure. She has been on haemodialysis treatment for quite some time and is presently wheelchair bound. In her affidavit, she averred amongst others that she offered her unreserved, unconditional and unqualified apology to the court for being disrespectful. She also averred that she was advised by her solicitors in dealing with the matter and as a lay person, she had acted on that advice.

[16] As regards Doris, she a pensioner and has been residing in England for years. In para. 18 of the affidavit, she averred that she is incapacitated by old age and unable to travel. She also averred that in dealing with the matter she was advised by her solicitors and as a layperson likewise, she had acted on that advice.

[17] Learned counsel Dato' David Gurupatham prayed, on behalf of both Ah Eng and Doris that their personal attendance in court be dispensed with and the matter against them be dealt with *in absentia*. He also prayed that both of them be discharged and/or let off with a warning. Learned counsel informed the court that both of them are not asserting their right; in fact they have waived their right to be present in court and are prepared to be sentenced *in absentia*.

[18] Learned counsel also submitted that the court has unlimited jurisdiction to deal with the matter which includes the power to impose sentence *in absentia*, and the court ought to take into consideration the very special facts and mitigating points (as stated in the affidavits as highlighted above) in imposing an appropriate sentence on them.

[19] Learned Senior Federal Counsel supported the application, citing the case of *JSC BTA Bank v. Solodchenka* [2011] EWHC 2163 (Ch) as an authority to support the exercise of discretion by the court on the matter.

[20] The issue before us is whether this court has the power to proceed with the trial of the contempt proceedings and to impose sentence against both the contemnors (Ah Eng and Doris) who, as affirmed in their affidavits and through their counsel in open court, had offered their unreserved, unconditional and unqualified apology and had waived their right to be present in court and were prepared to be sentenced *in absentia*.

[21] We are reminded that contempt proceedings are *quasi*-criminal in nature. Thus, generally, the court should avoid making a committal order without giving the contemnor a chance to be present in court to answer the charge against her and to raise any plea of mitigation before passing sentence on her. The House of Lords in *Phonographic Performance Ltd v. Inch* [2002] All ER (D) 253 expressed the view that in criminal cases, where the defendant is absent, and the court has the discretion to proceed with the trial, but it is a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings. The trial conducted in the absence of the contemnor must be fair as circumstances permit and lead to a just outcome (see also: *R v. Jones* [2003] 1 AC 1).

[22] By analogy, the above position can and should apply for contempt proceedings, as in the present case before us. The court can exercise its discretion to proceed with the contempt proceedings against both the contemnors in the present case in their absence especially when their own counsel had informed the court about their request that their presence in court be dispensed with and that he has full instruction to proceed with the matter as requested.

[23] The decision of the English High Court in *JSC BTA Bank v. Solodchenko and Others (No. 2)* [2011] 1 WLR 906 supports the above proposition. In that case, the court had proceeded to hear committal proceedings *in absentia* on the basis that the defendant, in that case, has instructed his solicitors and leading counsel to represent him in court.

[24] In *Chung Onn v. Chan Ah Kaw & Anor* [1996] 1 LNS 456; [1996] MLJU 206 and *Indira Gandhi Mutho v. Patmanathan Krishnan And (Anyone Having Custody And Control Over Prasana Diksa)* [2015] 6 CLJ 35; [2015] 7 MLJ 153, our High Courts proceeded with the contempt proceedings as the alleged contemnors had persistently failed to attend court on the dates fixed for trial though duly served with the contempt papers.

[25] In *Re Ellison (A Bankrupt); Hicken (as Trustee in Bankruptcy of Ellison) v. Ellison* [2016] EWHC 2791 (Ch), Warren J proceeded with the contempt proceedings against an alleged contemnor who was out of the country and was not present in court for the trial. In that case, the learned judge considered the following considerations, namely:

(a) whether the alleged contemnor had been served with the relevant documents, including the notice of the trial;

(b) whether the alleged contemnor had sufficient notice to enable him to prepare for his case;

(c) reason advanced for his non-appearance in court;

(d) whether the contemnor had waived his right to be present in court; and

(e) the extent of disadvantage or prejudice suffered by the contemnor in not being able to be present in court during the trial.

[26] In another case, *Sanchez v. Oboz* [2015] EWHC 611 (Fam), the trial to determine whether an act of contempt had been committed by an alleged contemnor, the court proceeded with the trial and sentenced him to 12 months' imprisonment. In that case, the court found that the alleged contemnor, who had remained in Poland, had been properly served with the notice of the proceeding; had been afforded adequate notice of the application and had offered no explanation for his absence. The court concluded that it was fair and just to proceed with the trial in his absence.

[27] Based on the above authorities, we agree with both learned counsel and learned Senior Federal Counsel, that this court has the power to proceed with the trial to determine their guilt of contempt as charged and consequently to proceed sentencing them. Both the contemnors had in their affidavits and through their counsel in open court voluntarily requested for such course of action. They knew the nature and consequence of their request. Such course of action did not cause any prejudice to both of them.

Based on the mitigating factors and circumstances of the case, as narrated above, we are satisfied that this is an appropriate case for this court to accede to their request and to impose the appropriate sentence against them.

[28] As for sentence, learned counsel for both the contemnors in their mitigation repeated the same facts as narrated above for our consideration. Learned counsel prayed that "this court to be magnanimous and compassionate and to discharge them and/or let them off with a warning." Learned counsel also stressed that Ah Eng, now 88 years old, is suffering from kidney failure and is presently wheelchair bound and is on haemodialysis treatment thrice a week. In her affidavit, she affirmed that she has extreme anguish, anxiety and mental torture since the leave to issue contempt was made on 3 April 2012.

[29] The other contemnors, Doris, is also in her 80's. In her affidavit, she affirmed that she is incapacitated, of old age pensioner and has been residing in England for years. She also affirmed that she has extreme anguish, anxiety and mental torture since the leave to issue contempt was made on 3 April 2012. Both of them stated that they were advised by their solicitors and as lay persons, acted on the advice in preparing the legal documentation for the purpose of the review action. They had admitted guilt before this court and expressed remorse and put forward their unqualified and unreserved apology. Learned Senior Federal Counsel indicated that both the contemnors in the present case can be found guilty of the charge and should be sentenced to a fine of RM100,000 in default eight months' imprisonment.

[30] We took note that there were 20 other contemnors in this contempt proceedings (comprising of the majority and minority contributories) who had earlier conceded to the contempt charges against them, admitted their guilt and expressed their unreserved apology and remorse to this court without putting up a defence. Many of them were also of advanced age and unwell. With that concession which was accepted by this court, they were sentenced to a fine of RM100,000 in default eight months' imprisonment against each of them. The lawyer, Thisinayagam a/l A Somasundraman was fined RM150,000 in default one year imprisonment.

[31] In passing the above sentence on them, this court (in a judgment written by Suriyadi Halim Omar FCJ) had expressed the following views:

> The saving grace for the respondents was the concession made by the learned Senior Federal Counsel that she was not pressing for a custodial sentence though did suggest fining them. This was not unreasonable bearing in mind that many of the respondents were of advanced age and unwell. Regardless, despite the profuse apology, and the respondents' medical condition, the gravity of the offence is not lessened.
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> It is undeniable that the allegations made against the Federal Court is very serious and has besmirched the good name of the judiciary as a whole. They have subverted the course of the administration of justice

A and undermined the public confidence in the judiciary, ridicule, scandalised and offend the dignity, integrity and impartiality of the Judiciary. We hold the view that the above sentence is adequate and sufficiently reflects that seriousness of the offence committed by them against the court. As said earlier, as most of them are of advanced age and unwell, to imprison them might be too excessive a sentence.

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[32] We adopt the same view and consideration in dealing with the two contemnors (Ah Eng and Doris) presently before us. We therefore, held that the appropriate sentence against both of them, was a fine of RM100,000 in default eight months' imprisonment each. We ordered accordingly.

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